POLY ELECTRONIC & ELECTRICAL (M) SDN BHD

v.

DAEWOO CORPORATION (NO 1)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S1-(S7)-22-164-2001]
21 MARCH 2003

CIVIL PROCEDURE: *Injunction - Mareva injunction - Plaintiff granted Mareva injunction restraining defendant from disposing of assets - Application by plaintiff for disclosure of defendant's assets - Whether application was res judicata - Whether there was risk of assets being removed - Whether application should be allowed*

This was the plaintiff's application ('encl. 56') seeking disclosure by the defendant of all its assets within the jurisdiction to the value of RM5,263,475 *via* affidavit to be filed within ten days of the date of service of the order upon them. The plaintiff had, by way of encl. 30, initially obtained a Mareva injunction from the learned judge of the S1 court ('the learned judge') restraining the defendant from disposing of, or dealing with, its assets, insofar as the same did not exceed the sum of RM5,263,475. The plaintiff, however, discovered that they could not ascertain whether the defendant had in fact set aside assets to the value of RM5,263,475 pursuant to the Mareva injunction. Hence, the plaintiff filed encl. 56 on the basis that there was a need for the defendant to disclose to this court that the sum of RM5,263,475 had, in fact, been retained in the bank account of the defendant. The defendant, however, submitted that since the learned judge had made no order as to prayers (2) to (6) of encl. 30, it was equivalent to a dismissal of the application in encl. 30, and that as a consequence, the doctrine of *res judicata* would operate to bar the plaintiff from pursuing its application in encl. 56.

Held:

[1] Since there was no decision made by the learned judge in regard to prayers (2) to (6) of encl. 30, the plaintiff was entitled to file encl. 56 as the matter had not been disposed of. Given the fact that the parties did not argue on prayers (2) to (6) of encl. 30 before the learned judge, it could not be said that *res judicata* would lie against the plaintiff when the plaintiff filed encl. 56. Furthermore, there was no difficulty for the defendant to comply with prayer (1) of encl. 56 as all the defendant had to do was to disclose its assets by way of affidavit. Moreover, the defendant was a Korean

company, and all the directors were citizens of South Korea, which meant that there was a possibility that the assets could be removed from the jurisdiction. Thus, in order to give effect to the Mareva injunction ordered by the learned judge, it would only be fair and in the interest of justice for encl. 56 to be allowed. (pp 77 g-h, 79 g, 85 d & 86 g)

[Ordered accordingly.]

Case(s) referred to:

A & Anor v. C & Ors [1981] 1 QB 956 ***(foll)***
Anne Meredith, Administratrix of Mary Turner v. Richard Gittins 18 QB 257 ***(dist)***
Art Trend Limited v. Blue Dolphin (Pte) Ltd [1983] 1 CLJ 342; [1983] CLJ (Rep) 985 CA ***(refd)***
Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97 ***(refd)***
Barclay-Johnson v. Yuill [1980] 3 All ER 190 ***(refd)***
Bekhor & Co Ltd v. Bilton [1981] 2 All ER 565 ***(refd)***
Carl Zeiss Stiftung v. Rayner & Keeler Ltd And Others (No 3) [1970] 1 Ch 506 ***(refd)***
Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***
Cretanor Maritime Co Ltd v. Irish Marine Management [1978] 3 All ER 164 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 MLJ 143 ***(refd)***
Prince Abdul Rahman v. Abu Taha [1980] 3 All ER 409 ***(refd)***
Rasu Maritima SA v. Perusahaan [1977] 3 All ER 324 ***(refd)***
The Ninemia Case [1984] 1 All ER 398 ***(refd)***
The Third Chandris Case [1979] 2 All ER 972 ***(refd)***
Z Ltd v. A-Z [1982] 1 All ER 556 ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, para. 6

Other source(s) referred to:

Mark SW Hoyle, *The Mareva Injunction And Related Orders*, 1985 edn, pp 90-92, 93-95
The Supreme Court Practice 1988, vol 2, p 1272

For the plaintiff - Zainur Zakaria (Anita Stephens); M/s Philip Choong & Co
For the defendant - Rodney Gomez; M/s Shearn Delamore & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

The Mareva Injunction, The Law And The Arguments Thereto

On 27 August 2001, the plaintiff by way of encl. 30 obtained a Mareva injunction from the learned judge of the S1 court. By that Mareva injunction, the defendant was restrained until further order of the court, whether by themselves, their servants, agents or howsoever, from disposing of or dealing with its assets within the jurisdiction, in so far as the same does not exceed the sum of RM5,263,475 save such sums as are reasonably necessary for the defendant's ordinary operational expenses. The plaintiff was certainly elated at obtaining the Mareva injunction against the defendant and so by letter dated 7 September 2001, the plaintiff served a certified copy of the Mareva injunction onto the defendant at the defendant's registered address at suite 16.05, 16th floor, Kenanga International, Jalan Sultan Ismail, 50250 Kuala Lumpur. By letters dated 10 September 2001, copies of the Mareva injunction were forwarded to the directors of the defendant at their registered office in Korea. Notwithstanding the elation, the plaintiff discovered that they could not ascertain whether the defendant had in fact set aside assets to the value of RM5,263,475 pursuant to the Mareva injunction. The stand of the plaintiff was this: that there was a need for the defendant to disclose to this court that the sum of RM5,263,475 had, in fact, been retained in the bank account of the defendant within jurisdiction in compliance with the Mareva injunction that was issued by the S1 court. So, by way of encl. 56, the plaintiff filed a summons in chambers and sought for the following orders:

(1) The defendant discloses all its assets within the jurisdiction to the value of RM5,263,475.00 by way of affidavit to be filed within ten (10) days of the date of service of the order upon them.

(2) The costs of this application be borne by the defendant.

(3) Such further or other order as may be deemed fit.

Mr Zainur Zakaria, the learned counsel for the plaintiff, submitted that it was to give effect to the Mareva injunction that was granted by the learned judge from the S1 court in encl. 30 that prompted the plaintiff to file the application in encl. 56. He feared that if effect was not given to the Mareva injunction that was granted by the S1 court in encl. 30, then that Mareva injunction would only be a paper judgment devoid of effectiveness. Mr Zainur Zakaria emphasised, time and again, that the defendant is a foreign company and he lamented that:

If they (referring to the defendant) pack up their bags what will happen to us (referring to the plaintiff).

Mr Rodney Gomez, the learned counsel for the defendant, challenged encl. 56 and he drew my attention to the following prayers that were sought before the learned judge in the S1 court by way of encl. 30 (see exh. "JKS-1" of encl. 59 of the affidavit in reply of Jae Keuk Shim, a Korean national residing at 15B-2-3, Everett Tower, Mont Kiara Pines, 1/70 C, Off Jalan Bukit Kiara, 54080 Kuala Lumpur and who affirmed that affidavit in reply on 26 August 2002 and that exh. "JKS-1" was a summons in chambers for a Mareva injunction marked as encl. 30 before the S1 court):

(1) The defendant until further order of the court, be restrained whether by themselves, their servants, agents or howsoever, from disposing of or dealing with its assets within the jurisdiction, in so far as the same does not exceed the sum of RM5,263,475.00 save such sums as are reasonably necessary for the defendant's ordinary operational expenses.

(2) The defendant discloses all its assets within the jurisdiction, giving particulars as to the value nature and whereabouts of such assets by way of an affidavit to be filed within ten days of the service of this Order upon them.

(3) A date for the *inter partes* hearing of this application be fixed within 14 days of this Order.

(4) The defendant or any person affected by this order be at liberty to apply to set aside or vary this order.

(5) The costs of this application be borne by the defendant.

(6) Such further or other order as may be deemed fit.

After having heard encl. 30, the learned judge of the S1 court gave an order in terms of encl. 30, prayer one as stated above and he too made an order that costs be costs in the cause. In regard to the other prayers in encl. 30, this was what the learned judge of the S1 court said (see the notes of evidence marked as "JKS-3" of encl. 59):

No order as to the other prayers.

The grounds of judgment of the learned judge of the S1 court can be seen in exh. "JKS-4" of encl. 59 and there his Lordship categorically allowed prayer one of encl. 30 and made no order as to the prayers at (2), (3), (4), (5) and (6) of encl. 30. The learned judge of the S1 court also ordered that costs be in the cause.

By referring to encl. 30 that was heard by the learned judge of the S1 court, it was sought to argue that the doctrine of *res judicata* would operate to bar the plaintiff from pursuing its application in encl. 56 before this court. It was also pointed out that on 7 September 2001, the defendant had filed a notice of appeal to the Court of Appeal against the decision of the learned judge of the S1 court but, somehow, it was cynically pointed out that the plaintiff did not lodge any cross appeal against the decision of the S1 court.

A submission was made on behalf of the defendant to effect that when the learned judge of the S1 court made no order as to prayers (2) to (6) of encl. 30, it was equivalent to a dismissal of the application in encl. 30. It was submitted that the plaintiff had recognised this fact when the plaintiff filed encl. 56. The learned counsel for the defendant drew my attention to the case of *Anne Meredith, Administratrix of Mary Turner v. Richard Gittins* 18 QB 257, 96. In that case, the plaintiff there had on April 1851 recovered in the Superior Court a sum under 40s. In June 1851, the plaintiff there then took out a summons before a judge in chambers for costs under stat. 13 & 14 Vict. c. 61, section 13. The learned judge who heard the case held that although concurrent jurisdiction was proved yet held that he had the discretion as to the making of an order for costs and he then indorsed the summons with the words "no order". In January 1852, the plaintiff there then moved the court of the Queen's Bench to be allowed the said costs. Lord Campbell CJ, held that the application must be considered as an appeal from the decision of the judge in chambers and that it was made too late in the day. Wightman J, shared the same opinion as that of Lord Campbell CJ. However, it is interesting to read the judgment of Erle J, when his Lordship said at p. 97 of the report:

> I think it must be taken here that the words 'no order' are equivalent to a dismissal of the summons. Sometimes they mean that the Judge does not choose to interfere. But here I think that the summons was so indorsed in the exercise of the Judge's jurisdiction under the statute, and that he must be considered to have refused the order. That being so, the application is clearly too late.

Delivering a separate judgment, Crompton J said at p. 97 of the report:

> I am of the same opinion. Under stat. 13 & 14 Vic. c. 61, section 13, plaintiffs have the option of applying for costs either before this court, or before a Judge at chambers. They must make their election; and, if they elect to go before a Judge at chambers, any subsequent application here, after his decision, is by way of appeal, and, as was decided in *Orchard v. Moxsy* (2E. & B. 206), cannot be made after so long a time as has elapsed in the present case. In *Asplin v. Blackman* (7 Exch. 386), the application was made to the Court in the first instance, the Judge at chambers having adjourned the case thither.

I was urged to apply the case of *Anne Meredith* vigorously and to hold that when the learned judge of the S1 court made no order as to prayers (2) to (6) of encl. 30, it was equivalent to the dismissal of the application in encl. 30, and, consequently it was urged upon me to hold that the filing of encl. 56 constituted *res judicata*. But, Mr Zainur Zakaria for the plaintiff pointed out that the case of *Anne Meredith* was concerned with only one order and that was the order for costs and that the court there made no order at all. Here, before the learned judge of the S1 court there were other prayers that were sought for in encl. 30 and as reproduced earlier. Mr Zainur Zakaria argued that one can certainly obtain discovery in aid of Mareva. He pointed out that before the learned judge in the S1 court, the parties did not argue in regard to prayer (2) of encl. 30 at all. But rather, he pointed out, that the parties before the learned judge in the S1 court were concerned with whether the plaintiff in encl. 30 was entitled to a Mareva injunction and that the parties argued on that point only and this was also confirmed by Mr Rodney Gomez. Mr Zainur Zakaria then posed the following question:

> Can it be said that the words 'no order' to be taken to mean that the judge in the S1 court dismissed prayer (2) of enclosure 30?

and he gave a reply in this way:

> I think not. No decision made on that prayer otherwise the judge would have recorded and said that prayer (2) be dismissed. If no decision was made on prayer (2) of enclosure 30, and the law allows the plaintiff to apply for discovery in aid of Mareva, why can't we come before Y.A. to make that application. What injustice is there to the defendant? What prejudice is there to the defendant?

The salient submissions of Mr Zainur Zakaria are certainly thought provoking. As I see it, if the learned judge of the S1 court did not make a decision pertaining to prayers (2) to (6) of encl. 30, then the matter had not been disposed off and so the plaintiff was entitled to file encl. 56 and this court too had the necessary jurisdiction to hear encl. 56. Indeed that would be, in essence, part and parcel of my judgment. Given the fact that the parties did not argue on prayers (2) to (6) of encl. 30 before the learned judge of the S1 court, it cannot be said that *res judicata* would lie against the plaintiff when the plaintiff file encl. 56. In my judgment, *res judicata* was not clearly established by the defendant. It would be germane, at this juncture, to refer to the case of *Carl Zeiss Stiftung v. Rayner & Keeler Ltd And Others (No 3)* [1970] 1 Ch 506 where a passage appears at p. 516 that reads as follows:

> The court has no discretion once *res judicata* is clearly established; but it must be clearly established.

Not to be outwitted, Mr Rodney Gomez submitted that the plaintiff could only file encl. 56 if there was "new evidence". For this proposition he relied on the passages that appear in "*The Supreme Court Practice 1988*", vol. 2 at p. 1272 where under caption "No order" it is stated as follows:

> Where a summons in the Q.B.D. is marked 'no order' (with or without some provision as to costs) the Master will not review his decision, except by consent. The proper remedy of an aggrieved party is to appeal to the Judge. But the fact that 'no order' is made on one summons will not preclude a similar summons on another occasion founded on new evidence.

But, Mr Rodney Gomez for the defendant confirmed at the bar that before the learned judge in the S1 court the parties were arguing on the issue as to whether the Mareva injunction was applicable. I see no reason to disbelieve Mr Rodney Gomez on this point. He has been very forthright in his submission and he seems to confirm what Mr Zainur Zakaria had said on this point. This was clearly a case where the parties merely argued as to the applicability of the Mareva injunction before the learned judge of the S1 court and nothing else. It was rather unfortunate that the learned judge of the S1 court who did not hear the arguments pertaining to prayers (2) to (6) of encl. 30, made a ruling that confused the parties when his Lordship said:

> No order as to the other prayers (referring to prayers (2) to (6) of enclosure 30).

His Lordship did not dismiss prayers (2) to (6) of encl. 30. So, since no decision was made by the learned judge in the S1 court in regard to prayers (2) to (6) of encl. 30, then the plaintiff was not barred from filing encl. 56. I am entitled to treat encl. 56 like as though the matter had not been disposed of by the S1 court. According to Mr. Zainur Zakaria, the Mareva injunction is restricted to the sum of RM5,263,475 and that it extends to monies apart from assets. He submitted that it can be in any form of assets – be it money, property, building or even land. Anything, for that matter. The objective of a Mareva injunction, according to him, is to prevent the dissipation of assets injuncted by Mareva. Reverting back to the case of *Anne Meredith*, he reiterated that there only the issue of costs was argued and so when the court there made no order, it can be said that the matter had ended. But the factual scenario was entirely different in the present case. It was the submission of Mr Zainur Zakaria that in considering encl. 56 there would not be any abuse of the process of the court. There would also be no injustice nor prejudice occasioned to the detriment of the defendant. It cannot be an abuse of the process of the court

because encl. 56 was designed for the purpose of giving effect to the legal process. He proceeded to submit that in the event this court were to grant encl. 56, how would it prejudice the defendant? It was his submission that if the defendant had a lot of assets exceeding RM5,263,475, as claimed, then the granting of encl. 56 in favour of the plaintiff would not prejudice the defendant at all. Indeed if the defendant was financially sound as portrayed by Jae Keuk Shim – the deputy general manager of the defendant, in his affidavit in reply in encl. 59 then there should not be any difficulty at all for the defendant to comply with encl. 56 in the event this court made an order in favour of the plaintiff. It is interesting to reproduce certain paragraphs of encl. 59. It would certainly make for an interesting reading material. Thus, at para. 8(v) of encl. 59, Jae Keuk Shim deposed as follows:

> The defendant is still registered as a foreign company in Malaysia and also maintains a locally incorporated company known as Daewoo Engineering & Construction (M) Sdn Bhd, with a paid up capital of RM5 million, 70% of which held by the defendant. The defendant also owns 20% of the shares in RHB-Daewoo Sdn Bhd, which has a paid up capital of about RM187 million.

At para. 8(vi) of encl. 59, Jae Keuk Shim categorically deposed that:

> The defendant has no intention whatsoever from withdrawing from Malaysia.

In support of the averment that the defendant is a "stable and profitable company", the defendant exhibited the latest audited accounts of the defendant for the year 2001 that was prepared by M/s Price Waterhouse Coopers, a reputable firm of Accountants and Auditors and this can be seen in exh. "JKS-6" of encl. 59. The defendant even proceeded to annex to encl. 59 as an exhibit marked as "JKS-7", the review report of the defendant for the period ending 31 January 2001.

Now, if what the defendant averred through Jae Keuk Shim in encl. 59 was indeed true and that the defendant is a "stable and profitable company", then there should not be any difficulty for the defendant to comply vigorously with encl. 56. There should not be any difficulty for the defendant to comply with prayer one of encl. 56. All the defendant has to do is to disclose its assets on affidavit, and nothing else.

It can be surmised that encl. 56 cannot be considered as a fishing expedition on the part of the plaintiff. The learned judge of the S1 court had ordered Mareva injunction and by way of encl. 56 at prayer one, the plaintiff is certainly entitled to seek an order that the defendant do disclose its assets within the jurisdiction to the value of RM5,263,475 by way of an affidavit.

Now, by virtue of para. 6 of the Schedule to the Courts of Judicature Act 1964 this court, just like any other High Court in Malaysia, has the jurisdiction to grant a Mareva injunction in appropriate circumstances (*Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260; *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143; and *Aspatra Sdn Bhd & 21 Ors. v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97. A Mareva injunction can certainly be granted against a defendant ordinarily resident within the court's jurisdiction (*Barclay-Johnson v. Yuill* [1980] 3 All ER 190). It is an ancillary relief and its availability is dependent on there being a pre-existing cause of action. It extends to those cases where there is a danger that the assets will be dissipated within the court's jurisdiction as well as cases where there is an acute danger of the removal of assets outside the court's jurisdiction (*Prince Abdul Rahman v. Abu Taha* [1980] 3 All ER 409).

It is correct to say and I so say that a Mareva injunction is an *in personam* order. It becomes *in rem* when it is brought to the notice of a third party not to aid in dealings with the assets of the defendant. It is good for a certain purpose only. It does not create a lien or any proprietary right at all. It gives no security or priority to the plaintiff over the assets frozen by a Mareva injunction (*Cretanor Maritime Co Ltd v. Irish Marine Management* [1978] 3 All ER 164). Only assets to the sum as specified in the Mareva injunction will be frozen. And the defendant would certainly be free to deal with the balance of his assets as he deems fit (*Z Ltd v. A-Z* [1982] 1 All ER 556, 565a and 575a).

Generally speaking, Mareva injunctions are issued under the Courts of Judicature Act 1964. The plaintiff has the onerous duty to show that it will be "just and convenient" that the order that is applied for ought to be granted. Certainly what is just and convenient would be dependent on the facts and circumstances of each case. The basic requirements which the applicants must satisfy when applying for Mareva injunctions can be found in the following authorities:

(1) *Rasu Maritima SA v. Perusahaan* [1977] 3 All ER 324;

(2) *The Third Chandris Case* [1979] 2 All ER 972;

(3) *The Ninemia Case* [1984] 1 All ER 398;

(4) *Art Trend Limited v. Blue Dolphin (Pte) Ltd* [1983] 1 CLJ 342; [1983] CLJ (Rep) 985;

(5) *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143; and

(6) *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22.

And these basic requirements may be stated as follows:

(a) the plaintiff must have an existing cause of action;

(b) the case must be a good arguable one;

(c) there are grounds for believing that the defendant has some assets in his possession or ownership within the jurisdiction; and

(d) there is a danger that the assets will be removed or dissipated within the jurisdiction.

Of course, it goes without saying that a Mareva injunction may be varied by the defendant particularly when the defendant has to use his assets to meet his ordinary living standard or his business expenses. But in order to do that the defendant must disclose all his assets within jurisdiction including those assets not within the court's jurisdiction (*Bekhor & Co Ltd v. Bilton* [1981] 2 All ER 565).

There are relevant and germane passages appearing in the book entitled "*The Mareva Injunction And Related Orders*" by Mark SW Hoyle, a 1985 edition. There, the learned author wrote at p. 90 to p. 92 of the book the following salient points:

The pursuit of further information

In the type of case where a Mareva is appropriate the defendant and his colleagues or advisers will usually have information vital to the plaintiff, whether to aid his case generally or to enable the Mareva Order to be effective.

In the ordinary way a party can seek an order for discovery relating to any matter in question in the case between the parties (Order 24 generally; see Order 26 for power to order interrogatories to be answered; servants and agents of corporations can be required to give discovery on behalf of the corporation – *Anderson v. Bank of British Columbia* [1876] 2 Ch D 644, at p. 659; *Harrington v. North London Polytechnic* [1984] 1 WLR 1293, CA, at p. 1300). However, this can only apply to cases where writs have been issued (Preferably where pleadings have been served – *RHM Foods Ltd v. Bovril Ltd* [1982] 1 WLR 661, CA), and where the discovery is to do with the issues in dispute. If the discovery is to establish what assets the defendant holds,

an application under the Rules is not the correct course, but the court nevertheless has power under its inherent jurisdiction (*A and Another v. C and Others* [1981] 1 QB 956, Goff J) to make an order in support of a Mareva, for example that a defendant discloses on affidavit his assets. The reason is that without such an order the Mareva itself might be ineffective because it does not bite on sufficient assets as these have been skilfully hidden from the plaintiff. Also, the plaintiff may be deterred from seeking or continuing a Mareva if he does not know how much the defendant has in case his undertaking as to damages is called upon if the order has the effect of freezing all assets in the absence of disclosure, over and above the sum necessary. This could occur, for example, if the defendant has 1 million pounds equally in five banks, but the individual sums are not known to the plaintiff. If the Mareva sum is 300,000 pounds and each bank is served with the order, the defendant's total sum of 1 million pounds will be frozen because each bank will fear being in breach as to its 200,000 pounds. An order to disclose this information will enable release of the balance of 700,000 pounds for the defendant's use. Similar problems can occur with other assets, and this order for discovery is frequently granted.

It should be noted that such an order is not to be used to police the Mareva to see if there has been a breach. Its purpose is to make effective the order by establishing the defendant's assets. *Ackner LJ in AJ Bekhor & Co Ltd v. Bilton* said ([1981] 1 QB 923 at p. 940; the better way to ensure compliance with a Mareva is to seek an order that the defendant be cross-examined on his affidavits, under Order 38, r. 2, or that any variations permitted thus far be revoked, see pp. 944-5):

> ... the power to order discovery to ensure that the Mareva jurisdiction is properly exercised and thereby to secure its objective of preventing the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the court in the action, cannot be found in the Rules ... .

It may be arguable therefore whether this power is one ancillary to the Mareva or based on a 'separate' inherent jurisdiction. In any event, it is accepted as exercisable, albeit with caution because it extends the court's interference with a party who has not yet been judged to be in breach of any legal duty.

A further basis on which to seek information is by means of a tracing order where there is a proprietary claim to assets. The purpose of this order is to search for particular funds or other assets, and not just to seek a defendant's general property. The power to make an order to trace what are essentially trust funds is well established, but because of its ramifications for third parties as well as defendants it is also exercised with caution. The reasoning for these orders was succinctly put by Templeman LJ in *Mediterranea Raffineria Siciliana Petroli SpA v. Mabanaft GmbH* [1978] CAT 816 (1 Dec. 1978) –

money was paid by mistake to the wrong parties; *London & County Securities v. Caplan (unreported)* (26 May 1978) – allegations of embezzlement of 5 million pounds):

> A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone.

Continuing further at p. 93 to p. 95 of the same book, the learned author aptly said:

> What is the situation where a defendant claims that he should not disclose any information because of the risk of self-incrimination? In essence, the courts are reluctant to refuse orders for this reason. In *Khan (MK) v. Khan (IA)* and others ([1982] 1 WLR 513, CA.) the plaintiff gave three blank cheques with the alleged intention that the first defendant was to purchase a property for him. The sum of 40,000 pounds was cashed but not used for the intended purpose, and after a demand for the money by the plaintiff the defendant claimed that the money was a loan. The plaintiff sought a Mareva, an account and inquiry, and a tracing order, and Stuart Smith J ordered the defendants to swear affidavits as to the whereabouts of the money. The defendants applied for discharge or a variation because of the risk of self-incrimination, but Wolf J dismissed their application. On appeal, it was held that the possible offences were within the exception to privilege of section 31 of the Theft Act 1968, and further, the criminal offences depended on how and why the money was used, and not where the money now was, which was the purpose of the order. Thus, a restrictive view of any privilege was taken (Note section 72 of the Supreme Court Act 1981, reducing the scope of privilege against self-incrimination in intellectual property cases).
>
> It is also open to one party to apply to inspect the banking accounts and records of another party under section 7 of the Bankers' Books Evidence Act 1879, which allows the court to make an order permitting any party to a legal proceeding to inspect and take copies of entries in a banker's books, so long as the inspection is in furtherance of the proceedings (The Act (s. 10) applies to both civil and criminal proceedings; *R v. Kingham* [1908] 2 KB 949). The Act applies to all records held by the bank in furtherance of its banking business and thus microfilm records, magnetic tapes and other mechanical and electronic data retrieval systems are included (*Barker v. Wilson* [1980] 70 Cr App R 283; Bankruptcy Act 1919, Sched. 6, para. 1; Civil Evidence Act 1968, s. 5; *R v. Grossman* [1981] Crim LR 396 – order to inspect Manx bank

records refused; see also *Power Curber International Ltd v. National Bank of Kuwait SAK* [1981] 1 WLR 1233, CA). However, it is likely that most, if not all, bank correspondence is not within the phrase 'bankers' books', unless it is of a specific nature relating to the mechanics of the account (*R v. Dodson* [1973] 77 Cr App R 91).

The power of the courts under this Act is considerable, and cannot be used as a fishing expedition. Good, sound reasons have to exist before an application will be approved. As Lord Widgery CJ explained in *Williams and Others v. Summerfield* ([1972] 2 QB 513, DC at p. 518):

> One must … recognise that an order under section 7 can be a very serious interference with the liberty of the subject. It can be a gross invasion of privacy; it is an order which clearly must only be made after the most careful thought and on the clearest grounds.

An application can be made *ex parte*, but it is preferable for notice to be given (See generally *R v. Marlborough St Stipendiary Magistrate, ex parte Simpson and Others* [1980] 70 Cr App R 291, DC). There can in fact be few circumstances that warrant an *ex parte* order, especially as it relates to documents and information maintained by the bank, and not the customer. If there is a fear that money will be removed the proper course is to apply in the first place for a Mareva. The Act cannot be used as a means to discover facts on which to base a Mareva unless legal proceedings have already started and the order is sought in connection with those. In such a case, evidence of risk which results from an order allowing inspection of accounts must, it is submitted, be relevant and admissible for a Mareva injunction in the same proceedings.

It has to be emphasised that information obtained by any order of the court is confidential, and cannot be used in other proceedings without leave, nor published. This is so whether the information has been read out in court or not, except that comment on it is permitted unless the court orders otherwise. In *Home Office v. Harman* Lord Diplock said ([1983] 1 AC 280, HL, at p. 230; see *Customs and Excise Commissioners v. AE Hamlin & Co* [1984] 1 WLR 509, Ch D, Falconer J):

> ... an order for production of documents to a solicitor on behalf of a party to civil litigation is made upon the implied undertaking given by the solicitor personally to the court (of which he is an officer) that he himself will not use or allow the documents or copies of them to be used for any collateral or ulterior purpose of his own, his client or anyone else; and any breach of that implied undertaking is a contempt of court by the solicitor himself.

The sum total of it all would be this. That the defendant should disclose all its assets within jurisdiction to the value of RM5,263,475 by way of an affidavit to be filed within ten days of the date of service of the order upon the defendant.

There is also a passage appearing in the judgment of Robert Goff J in the case of *A And Another v. C And Others* [1981] 1 QB 956 which should be reproduced. At p. 959 of the report, talking about the infancy of the Mareva injunction, his Lordship aptly said:

> I turn next to the Mareva jurisdiction. Here, I have not the benefit of authority to guide me, no doubt because the jurisdiction is still in its infancy, though it is (in the Commercial Court at least) very much a thriving infant. In these circumstances I must fall back on principle; and, as I have already stated, it is plain from the authorities that the principle underlying the jurisdiction is the prevention of an abuse – the abuse of a foreign resident causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against him in pending proceedings in this country.

Here, in our case, the defendant is a Korean company. And all the directors of the defendant are citizens of South Korea. So, the speech of Robert Goff J in that case would certainly be apt. The fear of assets to be removed from jurisdiction can never be overstated.

Proceeding further in his judgment, his Lordship Robert Goff in the same case said at p. 959 to p. 960 of the report:

> The defendant may have more than one asset within the jurisdiction – for example, he may have a number of bank accounts. The plaintiff does not know how much, if anything, is in any of them; nor does each of the defendant's bankers know what is in the other accounts. Without information about the state of each account it is difficult, if not impossible, to operate the Mareva jurisdiction properly; for example, if each banker prevents any drawing from his account to the limit of the sum claimed, the defendant will be treated oppressively, and the plaintiff may be held liable on his undertaking in damages. Again, there may be a single claim against a number of defendants; in that event the same difficulties may arise. Furthermore, the very generality of the order creates difficulty for the defendant's bankers, who may for example be unaware of the existence of other assets of the defendant within the jurisdiction; indeed, if a more specific order is possible, it may give much needed protection for the defendant's bankers, who are after all simply the innocent holders of one form of the defendant's assets.

Touching on the powers of the court to order discovery, his Lordship Robert Goff J in the same case, aptly said at p. 960 of the report:

> Considerations such as these point, in my judgment, to the conclusion that the court should, where necessary, exercise its powers to order discovery or interrogatories in order to ensure that the Mareva jurisdiction is properly

exercised and thereby to secure its objective which is, as I have described, the prevention of abuse. That the court has power to order discovery of particular documents and interrogatories at an early stage of proceedings is, I think, not in doubt. I refer in particular to R.S.C., Ord. 24, r. 7(1), in relation to discovery of documents, and to the general terms of Ord. 26, r.(1), in relation to interrogatories. If necessary, however, the court's power to make an appropriate order in aid of a Mareva injunction can be derived from the power to make mandatory orders conferred on the court by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, itself, subsection (1) of which provides:

> The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do.

If the court were to deny itself the right to exercise this jurisdiction in aid of the Mareva injunction, it could prevent the Mareva jurisdiction from being effective to achieve its purpose; for a plaintiff, faced with lack of knowledge of the value of a specified asset of a particular defendant, may, in the examples I have given, be deterred from giving his undertaking in damages with the result that he is unable to obtain the relief. In any event, in the examples I have given, the information may be necessary in the interests of justice to ensure that the jurisdiction is properly exercised.

Rounding up the subject matter on discovery and tracing, his Lordship Robert Goff J in the same case at p. 961 succinctly said:

> Such an order is, in my judgment, necessary both for the purposes of the tracing claim and the Mareva injunction. So far as the tracing claim is concerned, it is essential that the second plaintiffs discover the whereabouts of the sum of 383,872.44 pounds which they claim to be their property in equity; for that purpose it is desirable that they should know what sum is now standing in the account at the sixth defendant in the name of W.L.

Thus, in order to give effect to the Mareva injunction that was ordered by the learned judge of the S1 court, it would only be fair and in the interest of justice to allow encl. 56.

Conclusion

For the reasons adumbrated above, I gave an order in terms of encl. 56 prayers (1) and (2) thereof.